81-2373

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IN THE
SUPREME COURT OF THE UNITED STATES

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No.

PHILLIP GAZIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's Fourth and Fifth Amendment Due Process rights were violated when Petitioner's employee, who was acting in concert with the Government, took Petitioner's business records without consent or warrant, which records and their fruits were introduced in evidence against him.

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. Phillip Gaziano, Alfred Royster, Jr., and Suncrest Environmental Resources Corp., Phillip Gaziano, Appellant, at No. 81-2681. Petitioner's co-defendants below filed separate appeals denominated as United States of America v. Alfred Royster, Jr., No. 81-2682, and United States of America v. Suncrest Environmental Resources Corp., No. 81-2683, which appeals were consolidated before the Third Circuit Court of Appeals.

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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued a Judgment Order on May 11, 1982. A copy of this Order is contained in the Appendix at pp. 1a-3a.

On May 21, 1982, Petitioner filed a Motion to the United States Court of Appeals for the Third Circuit to stay the mandate pending this application to the Supreme Court of the United States for Writ of Certiorari.

On June 4, 1982, the Third Circuit Court of Appeals granted the Motion and stayed issuance of the mandate until July 1, 1982. A copy of the Order granting Petitioner's Motion is contained in the Appendix at p.4a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 11, 1982. Petitioner did not submit a petition for rehearing. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner, PHILLIP GAZIANO, (hereinafter "Gaziano"), was charged in a twenty-three (23) count indictment alleging mail fraud, commercial bribery and obstruction of justice, by conspiring with Alfred Royster, Jr., (hereinafter "Royster"), and Suncrest Environmental Resources Corporation, (hereinafter "Suncrest"), in a scheme to defraud West Penn Power Company, (hereinafter "West Penn"), Allegheny Power Systems, Inc., (hereinafter "Allegheny"), and the purchasers of electricity in the Western District of Pennsylvania and elsewhere who were customers of West Penn and Allegheny.

The indictment alleged that between 1977 to July of 1979 Gaziano and Suncrest conspired with Royster to switch coal samples provided for testing at the "Hatfield" facility, located in Masontown, Pennsylvania, in return for which Royster received approximately $41,000.00 in payments.

Evidence adduced at trial showed that Gaziano was the principal owner of Suncrest, and that Suncrest traded as a coal supplier for West Penn. Detailed description was provided for the procedures whereby coal was shipped to and received by West Penn, and how the coal was identified for later reimbursement to suppliers like Suncrest.

Suspicion by officials of West Penn regarding low prices for high quality coal offered by Suncrest caused West Penn to contact the FBI. The FBI undertook an investigation of Suncrest's coal selling practices, which resulted in the aforementioned indictment of Petitioner Gaziano and the others.

The Government offered numerous technical witnesses who testified to points of the case not here at issue.

The Government's principal testimony came from Henrietta Foster, (hereinafter "Foster"), a former secretary to Petitioner Gaziano and

Suncrest. She testified, and other evidence indicates, that in April of 1979 she became aware of a federal investigation into shipments of coal to the Hatfield Plant (Trial Transcript, page 1074), (hereinafter "TT"); a fellow employee named Lynch voiced suspicions to her that Suncrest was involved in some fraud with West Penn (TT 1071), (Suppression Transcript, page 17), (hereinafter "ST"); before going on vacation on July 1, 1979 she authorized Lynch to contact the FBI while she undertook to photocopy certain records belonging to Petitioner Gaziano and Suncrest, of which she had either become aware or participated in preparing during the period 1977-1978 and up to April of 1979 (TT 1071 ff.); she had no authorization to take these records (ST 53-55) which related to various payments of money, phone calls, corporate entries and other references that involved the alleged scheme to victimize West Penn (id.); Foster kept these records at home until a meeting

with FBI Agents and Lynch on July 17, 1979 (TT 17, 26, 53, 55), at which meeting the FBI inspected but did not take copies of these records at that time (TT 1079), (ST 24, 26, 51); on July 24, 1979 the FBI subpoenaed Suncrest's records (ST 9, 24, 29, 33); sometime around July 27, 1979 the FBI made arrangements with Foster to obtain the records previously inspected by the agents on July 17th (ST 53); on July 30th Foster furnished the FBI with these records (ST 9, 10, 34, 43); Foster remained Petitioner's secretary at Suncrest through July 24, 1979 when she quit after the Suncrest records were subpoenaed (ST 9, 24, 29, 33); in November of 1979, together with the FBI Agent, she reviewed all of the records subpoenaed by the Grand Jury on July 24th (TT 1091, 1163, 1168).

Foster testified as to certain conversations with Petitioner Gaziano pertaining to another person known as "Easy", "Al", or "Fred" and to phone numbers associated with that individual (TT

996); to arrangements for the purchase of airline tickets to New York for a Mr. Royster (TT 1008); to calls she was directed to make by Petitioner Gaziano to a telephone answering service in which she left the numbers of certain barges and time of shipment (TT 1000); to the preparation of checks used for alleged payments to "Easy" (TT 1002); to her own forging of such checks (TT 1003, 1047); and to the destruction of certain test records (TT 1024).

She was not able to identify co-indictee Royster as someone whom she had seen or to whom payments were made (TT 1005); Foster never overheard a conversation between Pettioner and Royster; significantly, she had no personal knowledge with respect to what, in fact, had ever happened at the Hatfield Plant (id.). On July 30th Foster was fitted with a body recorder by the FBI, engaged Petitioner in conversation and transcribed that conversation which concerned her proposed

appearance before the Federal Grand Jury in August of 1979 and her supposed knowledge of the Petitioner's relationship with "Easy" (ST 34).

Prior to trial, Petitioner filed a Motion to Suppress on the grounds that Foster had seized records without a warrant or consent while acting as a Government agent. The Motion was denied.

At the conclusion of the Government's case, the Court dismissed Counts 20 and 21 alleging certain obstructions of justice by Petitioner Gaziano, who then presented character witnesses and rested. Royster presented character witnesses and evidence that his father, who ran a filling station, serviced Gaziano vehicles and sometimes borrowed or loaned money to Gaziano as a convenience. He also testified that it was he who took the tickets to New York and went on a ship's cruise.

The jury returned a verdict of guilty as to all remaining counts on June 3, 1981. The Trial

Court sentenced Petitioner Gaziano to incarceration for five (5) years and to pay a total fine of $142,000.00. Suncrest was sentenced to pay a fine of $132,000.00. Royster was sentenced to incarceration for a term of three (3) years. On appeal to the United States Court of Appeals for the Third Circuit, the decision of the District Court was affirmed without opinion.

On May 11, 1982, the Petitioner timely filed a Motion To Stay Issuance Of Mandate Pending Appliation To The Supreme Court Of the United States for Writ of Certiorari.

On June 4, 1982, the United States Court of Appeals for the Third Circuit entered an Order staying issuance of the mandate in the instant case, until July 1, 1982, pending disposition of the instant Petition for Writ of Certiorari.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT

THE PETITIONER'S FOURTH AND FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN PETITONER'S EMPLOYEE, WHO WAS ACTING IN CONCERT WITH THE GOVERNMENT, TOOK PETITIONER'S BUSINESS RECORDS, WITHOUT CONSENT OR WARRANT, WHICH RECORDS AND THEIR FRUITS WERE INTRODUCED IN EVIDENCE AGAINST PETITIONER.

The pertinent chronology of events is as follows:

1. June, 1979 - Henrietta Foster takes and photocopies records in question without permission. (Motion to Suppress Transcript, pp. 17, 26, 53, 55), (hereinafter "ST");

2. July 17th - Foster meets with FBI Agents, who inspected the documents, but did not take them, instead directing Foster hold on to them until

subpoenaed on July 24th (ST 24, 26, 51) (Trial Transcript 1079), (hereinafter "TT"). FBI Agent Geitgey testified that he didn't take the records from Foster on the 17th because he wanted to obtain a legal opinion from the United States Attorney, although he knew that they were records related to Suncrest's activities (ST 36, 38, 42, 47, 51, 52);

3. July 24th - Suncrest is served with a Grand Jury subpoena by FBI Agents, including Geitgey, for various records. On this date, Foster decides to "quit" her employment;

4. July 27th (approximately) - FBI calls Foster to bring "records"

in (ST 43). Foster had earlier testified that she just decided on her own to go to the FBI on the 30th without prior arrangements (ST 10);

5. July 30th - Foster turns over to the FBI the records which she had previously shown them on July 17th, and which she retained thereafter until July 27th, when asked to bring them in by the FBI (St 9, 10, 34, 43); and

6. August 24th - Return date of Grand Jury subpoena for Suncrest records, copies of which Foster had already made (ST 33).

As the testimony thus clearly indicates, Foster remained both Suncrest's and Gaziano's employee

between July 17th and 24th, when she quit. Moreover, as is also evident, despite its knowledge, from July 17th on, of the existence and nature of Foster's documents, the FBI actively encouraged her to hold onto and then turn over records she had misappropriated. Thus, from July 17th, continuously through the 30th of July when she finally gave up these records, Foster was sufficiently an "agent" of the Government so as to invoke the protections of the Fourth Amendment and its requirements for a warrant, consent, or justification for search (ST 28, 31).

It has been stipulated that the Government obtained these records without a search warrant or any other legal process (ST 53-55). Rather the prosecution suggested that the retrieval of these records was made by a private citizen. Thus, the Government argues any seizure by her, however illegal otherwise under Pennsylvania law, does not

implicate the Government or the Fourth Amendment.[1]

Petitioner is aware that the Fourth Amendment applies to private searches, as made here by Foster, only if the private party may be regarded as having acted as an instrument or agent for the prosecution. Coolidge v. New Hampshire, 403 U.S. 443 (1977); United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976). Moreover, Petitioner is also

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1. The Government alternatively argues that Foster had authority in her position as secretary to Mr. Gaziano to retrieve and turn over such records. This position is ludicrous since there is not an iota of proof to suggest that she had any such authority, and indeed it defies credulity to suggest that any secretary would have authority to remove any records from her employer's files to give to any third party, much less the FBI in a criminal matter implicating that employer (ST 53). Moreover, the Government is no better off were it to argue that the Grand Jury subpoena, returnable August 24th, would have obtained these records, where it is clear the Government physically obtained them on July 30th before the subpoena was legally complied with. See, Wong Sun v. United States, 371 U.S. 471 (1963)

aware that there must be some degree of prosecution knowledge, acquiescence and involvement to invoke application of the Fourth Amendment. United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976).

Review of the cases demonstrates that whether a private search becomes Government action depends on a fact sensitive analysis. The Eighth Circuit for example, concluded that a two-pronged analysis of private searches must be made, analyzing the search, or viewing, aspect separately from the actual seizure, in order to determine whether there was sufficient Governmental participation. United States v. Haes, 551 F.2d 767 (8th Cir. 1977).

The Haes Court suppressed evidence where a carrier's routine opening of a package was found to be a private search which uncovered two allegedly "obscene" motion pictures, but where the search became a Governmental one when the FBI

obtained these films and "viewed" them without a search warrant. The same Court reached a similar conclusion and suppressed evidence, where books and magazines previously seized and within the control of a common carrier were examined by FBI Agents who replaced them in packages and later purchased them from Defendant's bookstore.[2] United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976).

Although denying the motion to suppress on facts before it, another federal court stated the proposition involved as follows:

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2. In the instant case, the agents inspected the records on July 17, 1979,, obtained a Grand Jury subpoena which they served on July 24th for the originals of the records to be viewed, and then obtained the copies on July 30th without waiting for compliance with the subpoena (ST 43, 52).

> The timing of the search by a private citizen is critical in determining whether the government was motivating the search. If the government is already involved in the investigation and has contacted the private individual, some government encouragement may be presumed, unless there are facts rebutting this.

United States v. Bloom, 450 F.Supp. 323, at 326 (E.D.Pa. 1978). Cf. United States v. Valen, 479 F.2d 467 (3rd Cir. 1973).

Applying the Bloom rationale to the instant case, investigation of Petitioner Gaziano and Suncrest was already underway as early as April of 1979, three months before the FBI agents talked to Foster on July 17, 1979 (TT 1074-75). In any event, on that date not having taken the records, but being aware of their allegedly criminal character, "some government encouragement may be presumed" since Foster was to hold the records until a subpoena was presented to Suncrest on July 30th after she had left her employment. Cf. United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1974)

where agents had not encouraged the private individual to seize the records.

United States v. Stein, 322 F.Supp. 346 (N.D.Il. 1971), reflects the legitimate concern attendant to the protection of a subject's Fourth Amendment rights. Moreover, it sets out sensible and realistic conclusions with respect to when it should be determined that a private party has become a government "agent". The District court there concluded that where records belonging to defendants charged with mail fraud were "acquired" and turned over to the prosecution by one who may well believe that his cooperation would result in his being left out of a mail fraud indictment, the Government cannot be heard to say it was totally divorced from the situation in which the third person came into possession. In suppressing the evidence, the Court went on to say:

> There is no clear and convincing evidence that he private individual was an agent of the government at this time, but there is ample reason to believe that he thought the government would reward him for turning over these records; just as there is no clear and convincing evidence that he stole the records, but there is ample reason to believe that he might have done so.
>
> Under these circumstances, it cannot be said that the government was totally divorced from the situation under which he came into possession of these records.

Stein, id. at 348.

If anything, the facts here are more egregious. Foster knew that the FBI investigation had already begun in April (TT 1074-75); that Lynch, a co-employee, had already suspected that some criminality had occurred (ST 19); that Foster herself had participated in at least some of the alleged crimes by forging signatures to certain checks (TT 1003); and that unlike the witness in Stein, she stole the records from her employers, a fact well known to the Government. Foster thus had ample reason to believe that cooperation would result in

her being left out of any indictment (mail fraud) toward which the Government investigation was building.[3]

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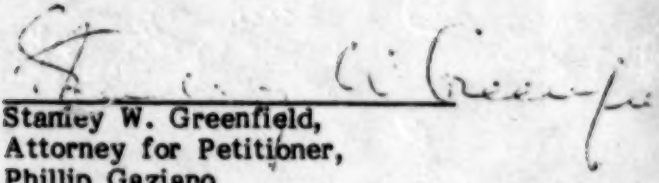
3. Foster's testimony that she was prompted to begin collecting the records in June, 1979 simply because she believed Gaziano was violating the law, although her suspicions, her own direct involvement, and the very records, each related to events over a year or more old, is ridiculous (ST 10) (TT 1071). Much more probable is the conclusion that she began pulling year old records after Lynch, her co-employee, told her of his own suspicions, which together with her knowledge that the FBI was already investigating, suggested to her that she had best take steps to protect her own interests. If truly motivated to be a good citizen as she contends, she surely would have come forward a year or more earlier when the related events of which she was aware took place, an observation the Government can't have failed to notice, if not emphasize, when deciding not to prosecute her.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

GREENFIELD & MURTAGH



Stanley W. Greenfield,
Attorney for Petitioner,
Phillip Gaziano

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 28th day of June, 1982, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS UNITED UNITED STATES MAIL, POSTAGE PREPAID:

1. Rex E. Lee
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GREENFIELD & MURTAGH

Stanley W. Greenfield,
Attorney for Petitioner,
Phillip Gaziano

SWORN to and subscribed before me

this 28th day of June, 1982

Notary Public

My Commission Expires:

JANE C. DINDINGER, Notary Public
Pittsburgh, Alleghany County, PA.
My Commission Expires June 7, 1984